

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY
Civil Action No. 83-2864(SA)

ANTONIO CIPOLLONE, individually,
and as Executor of the Estate
of Rose D. Cipollone,

Plaintiff,

-vs-

LIGGETT GROUP, INC., a
Delaware Corporation; PHILIP
MORRIS, INCORPORATED, a
Virginia Corporation; and
LOBB'S THEATRES, INC., a
New York Corporation,

Defendants.

:
:
: TRANSCRIPT OF
: PROCEEDINGS
:

: Newark, New Jersey

: April 13, 1983
: MORNING SESSION
:

B E F O R E:

HONORABLE H. LEE SAROKIN
UNITED STATES DISTRICT JUDGE

A P P E A R A N C E S:

BUDO, LARNER, GROSS, PICILLO, ROSENBAUM,
GREENBERG & SADE, ESQS.,
BY: MARC L. EDELL, ESQ.

-and-

MILENTZ, GOLDMAN & SPITZER, ESQS.,
BY: ALAN M. DARNELL, ESQ.,
Attorneys for the Plaintiff.

ARNOLD & PORTER, ESQS.,
BY: PETER K. BLEAKLEY, ESQ.,
BY: THOMAS E. SILPEN, ESQ.

Attorneys for the Defendant, Philip Morris.

Pursuant to Section 753 Title 28 United States Code,
the following transcript is certified to be an accurate
record as taken stenographically in the above-entitled
proceedings.

Joanne M. Houston
PHYLLIS T. LEWIS, C.S.R.

Official Court Reporter - United States District Court
P.O. Box 25588, Newark, New Jersey 07101

Main PI File Room

ORIGINAL

DO NOT Remove Permanently

PHYLLIS T. LEWIS, CSR & JOANNE M. HOUSTON, CSR

1
2 A P P E A R A N C E S: (Continued)

3 GREENBAUM, ROWE, SMITH, RAVIN, DAVIS &
4 BERGSTEIN, ESQS.,

5 BY: ALAN S. NAAR, ESQ.,

6 -and-

7 WEBSTER & SHEFFIELD, ESQS.,

8 BY: DONALD J. COHN, ESQ.,

9 JAMES KEARNEY, ESQ.,

10 FRANCIS DECKER, ESQ.,

11 Attorneys for Defendant, Liggett.

12 BROWN & CONNERY, ESQS.,

13 BY: RAYMOND P. DROZDOWSKI, ESQ.,

14 Attorneys for Defendant

15 Philip Morris.

16 STRYKER, TAMS & DILL, ESQS.,

17 BY: WILLIAM S. TUCKER, JR., ESQ.,

18 -and-

19 SBOOK, HARDY & BACON, ESQS.,

20 BY: STEVEN PARRISH, ESQ.,

21 ROBERT E. NORTHRIP, ESQ.,

22 PATRICK M. SIRRIDGE, ESQ.

23 Attorneys for Defendants,

24 Philip Morris and Lorillard.

I N D E X

<u>WITNESS</u>	<u>DIRECT</u>	<u>CROSS</u>	<u>REDIRECT</u>	<u>RECROSS</u>
----------------	---------------	--------------	-----------------	----------------

PROFESSOR FRED CARSTENSEN

By Mr. Edell:	7892	7933
---------------	------	------

By Mr. Parrish:	7912,
	7928, 7935

Voir Dire by Mr. Edell: 7915

DR. CLAUD MARTIN, JR.

BY Mr. Bleakley: 7945,
8016

Voir Dire by Mr. Edell: 7985

1 expected, but we have been being pretty good about being on
2 time, and I hope we will resume. Sorry.

3 Mr. Edell?

4 MR. EDELL: Professor Carstensen was on the stand.

5 THE COURT: You understand you are still under
6 oath?

7 THE WITNESS: Yes.

8 THE COURT: Please be seated.

9
10 P R O F E S S O R F R E D C A R S T E N S E N, resumed
11 the stand, previously sworn, and testified further as
12 follows:

13
14 CROSS-EXAMINATION CONTINUED

15 BY MR. EDELL:

16 Q Professor Carstensen, yesterday you talked about
17 Professor Tennet's book, is it?

18 A Yes.

19 Q And what edition did you rely upon?

20 A I only made the comment that I wasn't alone in having
21 that, the particular observation I made.

22 Q I asked you what edition of his book you relied upon for
23 making that statement?

24 A As I recall, there is only one edition.

25 Q The question we were discussing was the effect of

1 cigarette advertising on consumer's adoption of the filter
2 cigarettes, isn't that right? That was the quote we were
3 talking about?

4 A In the Sobel book?

5 Q Sobel's book?

6 A Right.

7 Q And the time frame we were talking about was we had some
8 discussion on it, was early 1950's, '52, '53, '54, remember
9 that discussion?

10 A Yes.

11 Q Tell the jury when Richard Tannet's book was written.

12 A I forget the date. It's probably early in there. I
13 wasn't relying on him in my comment specifically about that
14 issue. I don't think he talks about that particular period
15 of time.

16 I only relied or I had mentioned him in conjunction
17 with my general opinion about advertising.

18 Q We were discussing specifically the quote in Sobel's
19 book concerning filter cigarettes and you told the jury that
20 you weren't alone that Richard Tannet -- is it Richard?

21 A As I recall.

22 Q -- had also written on the subject and supported your
23 position.

24 Tell the jury the date of the book.

25 A Mr. Edell, if it's -- it's 1950.

1 If I may explain what I thought I responded to just
2 for -- so we understand each other.

3 You asked me in general.

4 I pointed out to you before giving my opinion that
5 I am not an expert on advertising, I am not an expert on
6 communications.

7 I asked you if you wanted my opinion in general as
8 a historian and only as a historian, and in general, my
9 skepticism about any claims about advertising derived simply
10 from two generic, and I emphasize, I do believe I used the
11 word generic.

12 Q During --

13 A Wait a minute. If I may finish, please.

14 Generic concerns. That there are two problems with
15 ascribing to advertising some kind of an unique role.

16 Number one, we have --

17 Q Professor --

18 A Wait, wait.

19 Q Professor --

20 A If I may explain I was not using it in the way in which
21 you suggested --

22 Q You told us that and that is a response. We don't need
23 to go into your entire opinion on the subject all over
24 again. The transcript will reflect what you said.

25 Did you review books such as the biography contact

1 of Edward Bernays? Do you know who he is?

2 A I remember the name.

3 Q Tell the jury who Edward Bernays is.

4 A He was one of the public relations people.

5 Q Employed by who?

6 A I don't really recall. As I indicated I did not do a
7 history of advertising, and I did not do an advertising of
8 public relations.

9 Q Therefore, you don't know what Bernays said concerning
10 the growth of the cigarette market as a result of their
11 advertising and promotion of the product, is that correct?

12 A Correct.

13 Q And who is John Kenneth Galbraith?

14 A Think he is professor emeritus at Harvard.

15 Q In what department?

16 A He is in the economics department.

17 Q Did you read this book, The Affluent Society?

18 A Long time ago.

19 Q Professor Galbraith, does he ever express opinions
20 concerning the effects of cigarette advertising on the
21 market?

22 A Oh, he may have.

23 Q You don't know what they are?

24 A Don't recall, no.

25 Q Did you review any books such as the Mirror Makers, the

1 History of American Advertising and its Creators? Did you
2 review such books like this?

3 A I looked at some of the literature, but I'm not and I
4 don't pretend to be an expert in the history of advertising.

5 Q But you're an expert, you've told this jury, on the
6 history of trends and cigarette use, right?

7 A I have looked at those trends and I have both a sense of
8 what the broad framework was of both increase and decrease,
9 and as a historian, I've looked at the broad changes in
10 society that were parallel with them, just as I did for the
11 earlier period. I've also done for the later period.

12 Q Did you take a look at cigarette advertising on radio?

13 A No, I didn't have an access to that.

14 Q You had access to books that talked about cigarette
15 advertising on radio. Didn't they talk about the tremendous
16 influx of support for various radio shows by companies such
17 as Liggett and R. J. Reynolds?

18 A I knew that there had been support and I looked at it in
19 terms -- just to give a perspective of what the role was in
20 terms of total advertising budgets.

21 Q As a matter of fact, many of those shows were fully
22 sponsored by the tobacco industry. Isn't that correct?

23 A Some of them were, yes.

24 Q Which ones?

25 A I didn't attempt to reconstruct the particular shows.

1 Q What about television, how many TV shows were fully
2 sponsored by the tobacco industry?

3 A I didn't make a count of those.

4 Q Which ones were?

5 A Well, you know, I have casual memories of shows.

6 Q Name one, name one.

7 A Well, there was that one with Gaty Moore.

8 Q What's the name of the show?

9 A I used to watch it, "What's My Line," I think it was or
10 something like that.

11 Q Let's go back a little earlier. Any of the earlier
12 shows fully sponsored by the tobacco industry or any of the
13 defendants in this case?

14 A I didn't -- as I've said repeatedly, I did not attempt
15 to reconstruct the history of advertising in the industry.

16 Q But you told this jury that advertising was an
17 insignificant part of the information environment. Isn't
18 that correct?

19 A I said I didn't think it was a particularly important
20 part.

21 Q You didn't know that the cigarette industry was the
22 third largest advertiser on television?

23 A Well, of course, it varies by period, but that wouldn't
24 surprise me.

25 Q And that's insignificant in terms of the information

1 environment. Is that correct?

2 A I don't know what it says about the information
3 environment. It talks about the relative position in
4 advertising.

5 Q And you reviewed the Federal Trade Commission reports to
6 see what the Federal Trade Commission felt concerning the
7 significance of cigarette advertising on the information
8 environment?

9 A There are many people who thought that advertising
10 played an important role. I looked at George Washington
11 Hill, Lasker. I'm sure others make similar claims. The
12 only opinion that I have is the generic opinion that I
13 expressed earlier that there is neither a persuasive
14 econometric study that I'm aware that demonstrates that
15 advertising expenditures can be related in any coherent
16 pattern to patterns of consumption.

17 And, indeed, we have additional problems, as I
18 indicated before, that we had patterns and trends and
19 changes in consumption patterns long before we had
20 advertising and Gio Averson could write a history of tobacco
21 in 1916 without, in fact, any reference at all to the role
22 of advertising because there essentially was none. So I
23 have a generic opinion. I do not have an opinion -- I was
24 not asked to study the history of advertising or to form a
25 specific opinion about it. If I had been asked to do that,

1 I would have refused. That is not my field, that is not
2 where my expertise lies. I'm a historian and I
3 reconstructed the information environment regarding smoking
4 and health.

5 Now, it's clear that advertising is part of that
6 environment. The mere record, the evolution in the
7 formation of consumption. Yes, there was advertising for
8 filter cigarettes, but filter cigarettes came to be a larger
9 proportion of the market.

10 I don't know what causal relationship is in that
11 case. I haven't seen a study that is persuasive that says
12 somehow the cigarette industry managed to do something that
13 no other industry has done, which is to get sort of a Holy
14 Grail advertising and manipulate everybody and protect
15 itself from broad changes in society. It wasn't true for
16 the other usages of tobacco prior to 1920, it hasn't been
17 true for the cigarette industry in the later period, so I
18 have a generic opinion and nothing else.

19 Q Do you remember the question, sir?

20 A I'm not sure I do at this point.

21 Q The question was very simple.

22 Did you review any reports on the Fed -- of the
23 Federal Trade Commission regarding its opinions about
24 whether or not cigarette advertising had a significant
25 affect on the information environment?

1 Simple question. Yes, I did, Mr. Edell, no, I
2 didn't, Mr. Edell.

3 A I saw some of those, yes.

4 Q And can you tell the jury what the Federal Trade
5 Commission had to say concerning the significance of
6 cigarette advertising in the information environment?

7 MR. PARRISH: Excuse me. Can we have a time frame
8 for the question?

9 MR. EDELL: We're talking about his review of the
10 Federal Trade Commission. I don't know what the date is of
11 his review of these documents. You told me he confined his
12 review to pre-'66.

13 MR. PARRISH: That's what I want to make clear;
14 it's pre-'66.

15 A Well, there were a variety of FTC concerns about
16 cigarette advertising.

17 Again, as I've said, I wasn't interested
18 particularly in recreating the history. They were critical
19 of the industry, as were other people.

20 Q We're just talking about the FTC, sir, okay?

21 A Yeah.

22 Q Were you aware that the Federal Trade Commission was of
23 the opinion that cigarette commercials appealed to youth and
24 continued to blot out any consciousness of the health
25 hazards of cigarette smoking?

1 A I think I saw those references, yeah.

2 Q And that to allow the American public and especially
3 teenagers the opportunity to make an informed and deliberate
4 choice of whether or not to start smoking, they must be
5 freed from constant exposure to such one-sided blandishments
6 and told the whole story?

7 MR. SILFEN: May we know what counsel is reading
8 from, what page?

9 MR. EDELL: Sure. From the FTC report to Congress,
10 June 30, 1967.

11 MR. PARRISH: I object. That was the specific
12 point of my last comment was -- may we approach the bench,
13 your Honor?

14 THE COURT:

15 (The following takes place at sidebar.)

16 MR. PARRISH: Your Honor, if there has been one
17 thing clear about the scope of Professor Carstensen's
18 testimony was that it was limited to the period of time
19 pre-1966.

20 In the question just prior to this, I stood up and
21 asked if we are limiting this to pre-1966. Then Mr. Edell
22 goes onto post-1966.

23 At this point I'm not going any further but to say
24 I object and I don't think Mr. Edell should be allowed to
25 explore post-1965 materials. For one thing, I think this

1 is --

2 THE COURT: First of all, the fact this was written
3 in 1967 -- this witness testified, by the way, again the
4 most unresponsive answers. He was asked a question whether
5 he ever looked at this report. He went on for ten minutes.
6 He never answered the question. He has repeatedly said that
7 in his view advertising is not significant in the
8 information environment. What it has to do with why or
9 whether people smoke, that isn't what we're talking about in
10 this case. We're talking about whether there was
11 information about health being transmitted.

12 He's now being confronted with something that shows
13 that cigarette smoking -- cigarette advertising is
14 significant.

15 MR. BLEARLEY: No, he's being confronted with what
16 someone claims.

17 MR. PARRISH: Your Honor, but it also is -- this is
18 a document --

19 THE COURT: It's not preempted. It has nothing to
20 do with preemption. It's a question of whether or not there
21 is any validity to this opinion that advertising is not
22 significant in the information environment.

23 MR. PARRISH: He's being asked -- first of all, one
24 thing I object to is that the witness has said that he
25 limited his testimony up to pre-1965 or pre-1966, excuse me.

1 To go beyond that, is, I think, beyond the scope of his
2 direct examination. And I think that the inference that Mr.
3 Edell --

4 THE COURT: There is no suggestion in this
5 statement that it suddenly began what's referred to 1967.

6 MR. EDELL: To the contrary. The analysis by the
7 FTC deals with '63, '64, '65 and '66. '66 is one of the
8 years, so it's only one-quarter of their total analysis. So
9 I think it's a gross misstatement to suggest that this
10 report deals with post-'66, a great fraction deals with
11 pre-'66.

12 MR. PARRISH: Your Honor, to me it's not only 25
13 percent, it's 25 percent. That's a large percentage. These
14 people write a report saying that based on the research
15 we've done of ads, at least 25 percent of the period. We
16 don't know quantitatively whether 25 -- whether 25 percent
17 or whether it's a lot more.

18 THE COURT: Suppose it is all after '66, what has
19 that got to do with testing the validity of his opinion as
20 to whether or not advertising is significant?

21 MR. PARRISH: He's saying --

22 THE COURT: Suppose they conduct the study last
23 week?

24 MR. PARRISH: His position, your Honor, is that the
25 advertising was not quantitatively a significant part of the

1 information environment prior to 1966. Now we're going to
2 cross-examine him about whether it was quantitatively or
3 qualitatively part of the information environment after 1966
4 and I don't think that's appropriate.

5 THE COURT: He can -- if he wants to make a
6 distinction and say that it was significant after '66 but
7 was not prior to '66 -- I mean, first of all, I'd be amazed
8 to hear any expert say that in 1966 advertising took on a
9 different meaning than it had pre-'66.

10 Are you suggesting that there is some difference as
11 to the significance before and after '66?

12 MR. PARRISH: No.

13 Your Honor, what we're suggesting is that we had
14 very carefully tried to abide by your Honor's guidelines
15 with regard to this post-'66, pre-'66 issue and really not
16 create the kind of problems about going beyond 1966. That's
17 what we did on our direct. I think that's what we ought to
18 do on cross. We tried to faithfully adhere to those
19 guidelines and I don't think we ought to go beyond those in
20 cross. That's what I'm saying, Judge.

21 MR. EDELL: Excuse me, Steve.

22 Your Honor, the Court has already permitted this
23 particular statement in evidence. It already came in
24 through Professor Conen. We had this argument and the Court
25 ruled on it.

1 In terms of it being precepted, even if it didn't
2 go to his credibility of his statement, that it's not part
3 of the -- it's not a significant part of the information
4 environment, is not correct. The Court has already
5 permitted this, considered it to be relevant and pertained
6 to the relevant time period.

7 In addition, for this witness to get up here and be
8 able to use that shield to support his proposition, when,
9 one, it concerns the time frame and, two, there is no
10 logical distinction between the two -- you know, I could see
11 if I paraded in 1968, '69, then I can see. When you're
12 dealing with it so close to the line, it deals with
13 three-quarters of the time period, three-quarters of the
14 time period deals with is a relevant time period, attacks
15 directly his opinion that he talks so eloquently on.

16 THE COURT: I'm going to overrule the objection.

17 (The following takes place in the presence of the
18 jury.)

19 MR. EDGELL: I can't remember the question. Let me
20 rephrase it.

21 Q Professor Carstensen, were you aware of the Federal
22 Trade Commission's report, statement that to allow the
23 American people and especially teenagers the opportunity to
24 make an informed and deliberate choice of whether or not to
25 start smoking they must be freed from constant exposure to

1 such one-sided blandishment and told the whole story? Are
2 you familiar with that statement, sir?

3 A I'm not sure that I'm -- I regard it exactly that way
4 but I remember seeing similar statements, sure.

5 Q Were you aware of the frequency of exposure to
6 advertising, cigarette advertising?

7 A I know that there were various kinds of numbers trotted
8 out. You know, obviously, I thought the analysis was
9 defective in a number of regards.

10 Q How about just millions of dollars, do you know what the
11 expenditures were in millions of dollars on television,
12 newspaper, radio and other forms of the media?

13 A I don't recall. Well, you'd have to give a time frame.

14 Q At any time frame?

15 A I know in, say, '65, I think advertising estimated total
16 media expenditure, I don't have the numbers with me, but I
17 recall around two billion or so.

18 Q And that's not a significant part of the information
19 environment?

20 A No, that was total expenditures, not cigarette industry.
21 Tobacco industry was fourth in the advertising adjustments
22 after autos, soap and detergents and food products. As I
23 recall it was something like ten or 15 percent of the total
24 in terms of expenditures.

25 Q Professor, you have no specific evidence that Rose was

1 exposed to any teaching aids regarding the hazards of
2 cigarette smoking, correct?

3 A No, there is no specific information.

4 Q And you have no idea as to what she specifically saw in
5 school when she was in school regarding cigarette smoking
6 and health. Isn't that correct?

7 A Well, we don't know the specific textbook, but we
8 certainly have information on what the curriculum guideline
9 called for and the textbook that was identified in the
10 recommended curriculum, so that it seems to me that there's
11 a reasonable probability of the kind of textbook that she
12 saw.

13 Q Tell us, what's the name of the book that was used at
14 her school?

15 A I don't know the name of the one that was used at her
16 school. I only know the one that was on the recommended
17 syllabus that came from New York State University and the
18 requirement of the law that any textbook that was used had
19 to contain information relating to this area.

20 Q What's the name of that book?

21 A The one that was recommended in the syllabus is by
22 O'Shay and Kellogg.

23 Q And you have no idea what pamphlets Rose Cipollone may
24 have received while she was in school regarding cigarette
25 smoking and health?

1 A No, no direct information on that.

2 Q Now, all of this information, starting back with the
3 King James Counterblast, this wasn't information that just
4 Rose Cipollone may have had access to. Is that correct?

5 A No. I had answered the question about awareness on two
6 levels; one was general and one related to Mrs. Cipollone
7 specifically.

8 Q So all of this information beginning back in what, you
9 started talking in the United States in the 19 -- 1800s,
10 1900s, early 1900s through Lucy Gaston Paige?

11 A Lucy Paige Gaston.

12 Q Lucy Paige Gaston.

13 That was all information that was available to the
14 tobacco industry, isn't it?

15 A Sure.

16 Q And you made no investigation whatsoever to see what
17 they were doing to determine whether their products were
18 hazardous. Isn't that right?

19 A That wasn't what I was asked to investigate.

20 Q Were you aware, sir, that they didn't start to make any
21 investigation to see whether their products caused cancer
22 until 1954?

23 MR. PARRISH: Objection.

24 THE COURT: Sustained.

25 Q In your review, sir, you didn't formulate any opinion as

1 to when cigarette manufacturers first advised their
2 customers of the health hazards of cigarette smoking. Isn't
3 that correct?

4 MR. COHN: Objection.

5 THE COURT: Overruled. That's information within
6 the area of his expertise.

7 A Well, as I said the other day, the only comment I would
8 make -- would make on that is the evidence that you,
9 yourself, had introduced, 2004, which I read in the
10 transcript of Dr. Cohen's testimony here, which the Roper
11 organization suggested that, indeed, the advertising itself
12 tended to serve as a confirmation. But beyond the
13 information that Joel Cohen provided on direct testimony
14 with you earlier, I'm not aware of other, what you might
15 call, affirmative warnings.

16 Q I asked you a question in deposition, page 91, line 3.

17 Question: When did the cigarette companies inform
18 their consumers or the public in general of the claims
19 regarding the use of their product and lung cancer?

20 Again -- and this is your answer:

21 Again I would have to go back and review the
22 literature specifically with relationship to that narrow,
23 specific question before I would venture an opinion.

24 Question: As we sit here today, you don't know, is
25 that correct, sir?

1 Answer: As we sit here today I cannot give you a
2 date at which the tobacco companies themselves conveyed to
3 the public specific information about claims about the
4 possible links between cigarette smoking and lung cancer,
5 that is correct.

6 Question: Can you give us a year they did it?

7 Answer: A year?

8 Yes. You said you can't give us a date. Maybe it
9 is too much to ask you to sit here and tell us precisely on
10 what date cigarette manufacturers informed their consumers
11 that there had been claims with regard to the use of their
12 product in the development of heart diseases and lung
13 cancer. So in order to avoid that burden, why don't I ask
14 you what year that occurred.

15 Answer: That doesn't really help me because --

16 Question: Try a decade. Tell us what decade it
17 occurred for the first time.

18 Answer: I repeat myself, I am not prepared at this
19 point without reviewing the materials, specifically with
20 relation to those two particular diseases and the particular
21 record of company behavior to indicate when or if they
22 undertook to communicate to their consumers.

23 Remember those questions and answers?

24 MR. BLEAKLEY: That is not impeachment. Just
25 reading testimony not inconsistent to it is referred into

1 the record what Carstensen said. It is not proper
2 impeachment.

3 MR. EDELL: I thought the witness said he reviewed
4 materials that told him when the tobacco companies began to
5 warn consumers.

6 THE COURT: It will be for the jury.

7 A If I may respond, I didn't. I said, I read your
8 witness, Mr. Conn's testimony and the quote from the exhibit
9 that you submitted, Mr. Edell, and I said that was the only
10 piece of information that I had in addition, other than
11 that, and you had also asked the broad question. Didn't ask
12 about the specific diseases, but generally about smoking and
13 health.

14 I said you had read into the record a statement as
15 an exhibit that made that statement. I don't have any
16 opinion as to the validity of that statement. As I said
17 before, I am not advertising a communication's expert. Your
18 Joel Cohen thought it proper or you thought it proper to
19 introduce the Roper opinion that the advertising itself
20 constituted a statement of about smoking and health.
21 Constituted a warning, as I recall the way it was phrased in
22 the exhibit, which I recall was 2004.

23 Other than that, I have not changed my opinion
24 on -- with respect to either broadly or generally to the way
25 in which I expressed myself at the deposition.

1 MR. EDELL: You also told the jury in this case
2 that you received \$25,000, is that correct?

3 A I -- roughly I think over two and a half years, yes,
4 about that.

5 Q And that was for approximately 1300 hours?

6 A I am not sure exactly what the hour count is. But it is
7 something in that ballpark, yes.

8 Q And you told the jury that it was at sixty-two fifty an
9 hour, is that correct?

10 A Well, I -- the way it was setup I was asked to do the
11 research at a rate of 85 a day and I think it works out
12 that --

13 Q If you calculate 1300 times sixty-two fifty, what do you
14 come out with?

15 A I am not sure. I did it very crudely.

16 Q You come out with over \$110,000, don't you?

17 A If that is the case, then I was wrong about the house.

18 MR. EDELL: Thank you.

19 THE COURT: Any redirect, Mr. Parrish.

20

21 REDIRECT EXAMINATION

22 BY MR. PARRISH:

23 Q Mr. Edell asked you questions about the school text that
24 may have been used in Mrs. Cipollone's school when she was
25 in school?

1 A Yes.

2 Q And you talked a little bit about this recommended text
3 and I think you mentioned the O'Shay and Kellogg book?

4 A Yes.

5 Q Did you find that book?

6 A We had -- we found versions of it. O'Shay and Kellogg
7 were enormously productive and the specific textbook that --
8 and also they changed the title of the particular title that
9 was recommended the year after the syllabus came out, but I
10 have seen a variety of O'Shay and Kellogg and they are all
11 essentially consistent, so the one I have I think is a
12 reasonable approximation of exactly what was recommended for
13 the schools.

14 Q Did you review that book with respect to what was said
15 about smoking and health?

16 A Yes.

17 Q What did you find?

18 A Well, it in fact included, incorporated material for
19 instance, I mentioned earlier the French Government study.

20 MR. EDELL: Excuse me. I thought the witness said
21 he couldn't identify the version that was to be used in
22 the -- at the time Rose Cipollone was in school.

23 MR. PARRISH: Right. Mr. Edell asked his questions
24 what he did find and I want the witness to say what the book
25 he found said.

1 I think it is clear to the jury as to what this
2 book is and what importance it may have.

3 MR. EDELL: Your Honor, I don't have an objection.

4 THE COURT: I will see you at side bar.

5 (The following takes place at side bar.)

6 MR. EDELL: I don't have an objection to him
7 identifying a book that should have been used in Rose
8 Cipollone's school. But if he can't testify it was used in
9 her school I don't see how it's relevant. Specifically, if
10 the Court thinks it's still relevant if he can't identify
11 the specific edition that would have been used during that
12 period of time, how can he testify as to the contents of the
13 book?

14 MR. PARRISH: What Professor Carstensen will say,
15 he made an attempt to find what he can find, and he found in
16 the book that he found that there is a discussion of it.

17 THE COURT: Do you have the book here?

18 MR. PARRISH: Yes, he does. Clearly, Judge, so
19 there wouldn't be a misimpression, he is right when he said
20 that Professor Carstensen was not able to find a book to say
21 this is the book Rose Cipollone used when she was in high
22 school in New York. But he says this is a book that was on
23 the recommended syllabus, and here is what it says.

24 I mean the jury will know that Mr. Edell already
25 asked him, were you able to find the book.

1 No, I wasn't able to.

2 MR. EDELL: How does it come in? If -- we don't
3 know it was part -- it was recommended?

4 MR. WORTSTRIP: Seems to me it's at least as
5 probative as saying because Mrs. Cipollone read the Enquirer
6 you should be able to put before the jury a specific issue
7 in the National Enquirer.

8 THE COURT: If you want a voir dire, I will give it
9 to you, but if he can establish that he is satisfied that
10 this was a book likely to have been used while she was in
11 school, even though he is not specifically certain of it,
12 but I also was going to say I don't think he ought to
13 summarize what it says. If he has the book, he ought to
14 read what it says.

15 MR. PARRISH: Let me get back.

16 MR. BLEAKLEY: The book is here.

17 MR. PARRISH: I will show Mr. Edell.

18 (End of side bar.)

19 (Mr. Edell reviews book.)

20 MR. EDELL: I would like a short voir dire on it.

21 THE COURT: All right. Voir dire.

22

23 VOIR DIRE EXAMINATION

24 BY MR. EDELL:

25 Q Professor, I have been handed this book. DJT-2720. Is

1 this the book by O'Shay and Kellogg that you referred to
2 previously?

3 A Yes.

4 Q This was -- it is your testimony that this particular
5 book was on the curriculum, recommended curriculum?

6 A The Kellogg's and O'Shay as I said before, had a wide
7 variety of text and there was some inconsistencies. The
8 texts themselves are essentially identical because I checked
9 them.

10 And it is my belief that this is typical of the
11 books that -- the titles varied -- this is the 1924 edition.
12 The syllabus came out in 1921, and the title in this series
13 was changed in '23, though from cross-checking there was not
14 a change in the pagination, so I believe it is the book that
15 is recommended.

16 Q Where is the book that is recommended?

17 A I could not find the -- the only available copy
18 according to the National Union on Catalogs is supposed to
19 be in the National Medical Library in Washington but we
20 couldn't locate the particular title.

21 Q It is in the book but you couldn't locate the title --
22 it is in the library but you couldn't locate the book?

23 A Supposed to be in the library. And the library could
24 not find it.

25 I have -- I did see the earlier edition, 1915

1 edition and there was a 1920 edition, the pagination was the
2 same, same in the '21 and the same in this one, so I think
3 that there is broad consistency.

4 Moreover, as I said, O'Shay and Kellogg, who were
5 two of the more important writers of textbooks put out two
6 series of textbooks that were graded for different levels.
7 The material in them is substantially unchanged from either
8 between the series or between the books. It just varies in
9 the specific amount of coverage, but the specific incidents
10 they relate and the specific statements that they make, for
11 instance, the classic one in most of the textbooks on,
12 nicotine will kill are consistent across all the texts that
13 I could find. I looked at about ten editions of Kellogg's
14 and O'Shay.

15 Q Very simply, you don't know that this is the same book
16 that was referenced in the curriculum, is that correct,
17 because you never looked at the book that was referenced in
18 the curriculum?

19 A They didn't give an edition number. I presume, since
20 the syllabus was published in '21 it was the 1920 edition.
21 I have seen the 1915 edition and the pagination was the
22 same. This is the '24 edition.

23 THE COURT: How do you know it was the same if you
24 didn't see it?

25 THE WITNESS: As I say, I don't know.

1 I looked at all the texts that O'Shay and Kellogg
2 put out. There are -- there are two series of four each
3 that they published between 1915 and 1925 that came out in
4 multiple printings. Most of them went through three
5 editions. There are some minor changes in the sections that
6 relate to tobacco between the different editions, but they
7 remain substantially the same across all of the text of the
8 Kellogg's and O'Shay texts that I could find.

9 As it happened, this one particular -- which I
10 don't know because the syllabus does not say the 1920
11 edition. I just made the inference that they were using the
12 latest edition. But I cross-checked which is, in fact,
13 common practice because sometimes we can't locate in
14 historical work the specific editions, so you cross-check
15 and see whether other things are consistent, and all I can
16 say is that, indeed, the texts were consistent between each
17 other and the approach and specifics that they claim that
18 they made relating to tobacco and health.

19 2 Just so we understand, simple question.

20 You never reviewed this particular text that was
21 recommended in the syllabus that you told us about, is that
22 correct? Yes or no? Did you review the specific text?

23 A If my assumption is correct that the syllabus referred
24 to the 1920 edition, of which there is supposedly only one
25 copy in existence, but the library could not locate, then,

1 no, I have not reviewed the specific one.

2 Q And how many other books are on the syllabus?

3 A For tobacco and health?

4 Q Yes.

5 A None.

6 Q This is the only book?

7 A The Kellogg and O'Shay is the recommended text for
8 tobacco, alcohol and what was called at the time human
9 efficiency --

10 Q What about just health in general? How many books are
11 on health in general?

12 A In the syllabus, I think that they probably listed ten
13 or twelve.

14 Q And there is no way to determine whether any one of
15 those books were ever used during the time period that Rose
16 Cipollone was in school, is that correct?

17 A Not in her particular school, because we have no records
18 on what her particular school was using for health. But the
19 state law mandated that the schools had to use textbooks
20 that conformed to a certain standard in terms of the
21 coverage of those issues.

22 Those texts are the ones that were recommended in
23 general and the O'Shay and Kellogg was recommended in
24 particular, and O'Shay and Kellogg went through multiple,
25 multiple printings of the book. It was a widely, widely

1 used book based on the information that we have on
2 publications.

3 Q But if the school chose to teach a health course, they
4 have wouldn't have to use this course to follow the
5 syllabus?

6 A They are not legally mandated to use a particular text.
7 They are legally mandated to use a text that conforms to the
8 state guidelines.

9 Q So there were ten general texts that the school could
10 have used, correct?

11 A Roughly something on that order.

12 Q You reviewed Rose Cipollone's deposition?

13 A Yes.

14 Q And you recall her testifying that she never received
15 any education regarding cigarette smoking while in school,
16 isn't that correct?

17 A She didn't recall any, no.

18 Q That was her testimony during her depositions, is that
19 correct?

20 A Correct.

21 MR. EDELL: May we be heard at side bar on this
22 issue?

23 (The following takes place at side bar.)

24 MR. EDELL: I think this is so far removed from
25 Rose Cipollone. This is one of 11 books, there is no

1 requirement that they use any one of those particular books.
2 And he has identified this is a specific book on tobacco and
3 alcohol. There are 11 other books that deal generally with
4 health. There is no nexus between the two. There is no
5 indication that the book was used at all in the metropolitan
6 area.

7 MR. PARRISH: I think it goes to weight, not
8 admissibility.

9 MR. EDELL: The Court's ruling before was there had
10 to be some showing that it was used in the area.

11 THE COURT: Reasonable likelihood is that she would
12 have seen it. How can we find it? He doesn't say this is
13 even the book that was on the syllabus and added to that, he
14 has no way of knowing if it ever made its way into her
15 school system. Those are two tough hurdles.

16 MR. BLEAKLEY: I think the evidence is as good as
17 the evidence that Mrs. Cipollone read the information of the
18 National Enquirer that you admitted.

19 THE COURT: No. She testified that she read the
20 National Enquirer or the Enquirer but there is no --

21 MR. BLEAKLEY: Not that she ever read the article.

22 THE COURT: How is this in any way -- how can the
23 jury reasonably conclude that she ever saw this book? If
24 you can satisfy me, I will receive it --

25 MR. BLEAKLEY: How can the jury conclude that she

1 ever saw the National Enquirer?

2 THE COURT: Because she read --

3 MR. CONN: Said she bought it and was embarrassed
4 to do so.

5 MR. BLEAKLEY: By admitting that document you let
6 the jury decide whether or not she saw the document and I
7 submit to your Honor you ought to let the jury see.

8 THE COURT: Is there a similar basis?

9 MR. EDSELL: There is no testimony in this case.
10 The only testimony that we have in the case as to what Rose
11 Cipollone did or did not see in terms of health education is
12 her testimony.

13 She said she did not receive any education on
14 tobacco and health, period. There is no statement by anyone
15 at her school, that tobacco and health was part of the
16 curriculum. There is no evidence that the book was used in
17 general.

18 There is no indication that this book as opposed to
19 any one of the other eleven books was used and I think that
20 you know there is no nexus. If somebody came and said, yeah
21 we followed this guideline and taught this subject, during
22 the time frame that Rose Cipollone was here, okay, then
23 there may be some nexus between the two and there is some
24 plausible argument Rose Cipollone didn't remember --

25 THE COURT: I would let it in if it was identified

1 as being on the syllabus, but he hasn't even done that.

2 MR. PARRISH: As I understand -- let me tell you
3 what I think the testimony is or the evidence is and why I
4 think this should come in.

5 It is obvious why there is nobody from the school
6 here to say what was used because nobody is around.

7 The state law at the time required that these
8 things be taught in schools. There was a recommended
9 syllabus.

10 THE COURT: From which they could choose?

11 MR. PARRISH: Right, your Honor.

12 And as Professor Carstensen has said, the O'Shay
13 and Kellogg text was the only one on tobacco and health and
14 then there were others that work on health.

15 So it seems to me that the state of the record so
16 far is that it was required to be taught. They had to use
17 one of the books on the recommended syllabus. That there
18 were "X" number of books on the recommended syllabus and
19 that this book, which was used at around the time, is
20 similar, if not identical to the book that was on the
21 recommended syllabus. So it is circumstantial evidence.

22 I mean the jury can decide, you know, Mr. Edell has
23 already done the cross. You don't know which book she used.
24 You are right.

25 THE COURT: You don't know what book the school

1 used.

2 MR. PARRISH: I agree it is a piece of
3 circumstantial evidence and that is all it is. But I think
4 the jury is entitled to see it.

5 MR. BLEARLEY: That is all any of this evidence is,
6 your Honor, other than specific testimony by Rose Cipollone
7 that she saw or didn't see these articles.

8 This jury is going to look when it goes into the
9 jury room to deliberate at a mass of evidence. Very, very
10 few of which pieces are ones that the record establishes she
11 clearly saw. And if this jury is going to go in the jury
12 room and make a decision about whether or not she saw the
13 National Enquirer or any other press matter that denies the
14 health risks of smoking then, by gosh, we ought to let the
15 jury decide.

16 THE COURT: But there has to be some threshold
17 showing, a chance she might have seen it. Some reasonable
18 opportunity.

19 MR. PARRISH: But Mr. Edell has put in the jury
20 binder this many articles from The New York Times even
21 though there is no testimony in the case that Mrs. Cipollone
22 ever read the New York Times. It was a New York
23 metropolitan area paper, but there is no evidence in the
24 case that she ever read The New York Times.

25 MR. EDELL: Your Honor, there are two reasons for

1 that. One of which is his testimony that he reviewed the
2 New York Times and compared it to the articles that appeared
3 in the Herald, Daily News and Bergen Record, and until he
4 got on the stand and was confronted with all of it he says
5 his review was consistent in terms of the coverage of the
6 issue. When confronted with the whole battery of newspaper
7 articles he backs off and says there was more in The New
8 York Times.

9 MR. PARRISH: Did not back off. Said they were
10 consistent.

11 MR. KEARNEY: Mr. Edell asked the question, was
12 this part of the information environment and the answer was,
13 of course. Nothing to do with whether or not Rose Cipollone
14 reasonably had seen it or not.

15 In fact, she didn't read the New York Times. It
16 was just part of the information environment.

17 THE COURT: What do you plan to do? Then will you
18 read specific sections of the book?

19 MR. PARRISH: That is what I plan to do, your
20 Honor. Mr. Edell got into it on cross.

21 THE COURT: How many pages is the book?

22 MR. EDELL: 200 and -- 311 pages.

23 MR. BLEAKLEY: He will not read 211 pages, your
24 Honor.

25 MR. EDELL: I will review it and, you know, see

1 what I have to do with it.

2 MR. NORTHRIP: Let me say that there was a state
3 law that required that the schools provide Mrs. Cipollone
4 education in the area of tobacco and alcohol, and so Mrs.
5 Cipollone testified that --

6 MR. EDELL: I didn't think that was his testimony
7 that there was a law that requires. I think the law was
8 that if you chose to teach the subject, that it was
9 recommended that you use these particular texts. I will
10 have to --

11 MR. PARRISH: It was my understanding --

12 MR. EDELL: He didn't say tobacco and health had to
13 be taught.

14 MR. NORTHRIP: I believe he said tobacco and
15 health.

16 MR. EDELL: Not tobacco and health.

17 MR. NORTHRIP: Yes.

18 THE COURT: I didn't hear him --

19 MR. EDELL: We didn't hear it.

20 THE COURT: Let us ask him that again. I will
21 reserve and I will rule you don't have to argue.

22 Wait a minute. Come back.

23 MR. EDELL: That does not satisfy the issue, your
24 Honor.

25 THE COURT: What troubles me about this is that as

1 I said, he can't identify this as being a book on the
2 syllabus, that the various boards of education apparently
3 had the right to choose among a variety of books. There is
4 no evidence that this book was ever in Mrs. Cipollone's
5 school system.

6 How then, forgetting about the National Enquirer
7 and New York Times, how is there any nexus, any reasonable
8 basis for me as the Judge or the jury to conclude that she
9 ever saw the book? If you can convince me of that with
10 those obstacles --

11 MR. NORTHTRIP: May I address the question of the
12 book being on the syllabus?

13 What he said was there is a reference to the text
14 put out by these people on the syllabus, that he checked all
15 of the editions except the 1920 edition which was not
16 specified on the syllabus, which he could not find but he
17 assumed since it was the latest edition before the
18 syllabus --

19 THE COURT: Assume you will get it on the syllabus,
20 then they have the right to choose among 11 books.

21 Is there any reasonable basis to conclude this is
22 the book they would have chosen and put in her system?

23 MR. CONN: Can I have one minute with Mr. Parrish,
24 see if we can't compromise?

25 MR. PARRISH: Tell me what to say.

1 (Counsel confer.)

2 MR. NORTHRIP: I was just responding, I thought
3 your Honor said if we could get it on the syllabus?

4 THE COURT: Those are the two hurdles. Assuming it
5 is on the syllabus and the boards of one of 11 books they
6 can pick, how can we say this is the book they likely would
7 have picked? That is the problem.

8 Anything else?

9 I will sustain the objection.

10 (The following takes place in the presence of the
11 jury.)

12

13 REDIRECT EXAMINATION CONTINUES

14 BY MR. PARRISH:

15

16 Q Professor Carstensen, did Mrs. Cipollone take health
17 courses in school?

18 A Yes.

19 Q How do you know that?

20 A Well, she said that she had taken regular health
21 courses. And with the family's permission, we got a copy of
22 her school records, which showed that, in fact, she had
23 taken the regular health courses, which, in fact, were
24 required by state law.

25 MR. PARRISH: Your Honor, I would offer the school

1 records into evidence.

2 THE COURT: Any objection, Mr. Edell?

3 MR. EDELL: Is this part of the binder?

4 Your Honor, I have no objection.

5 THE COURT: All right. In evidence.

6 MR. EDELL: As long as -- is this a representation
7 these are complete school records?

8 Q Professor, are these all the records in the jury binder?

9 A Yes.

10 THE COURT: You can review it at the break and make
11 sure you're both satisfied.

12 MR. EDELL: Thank you.

13 THE COURT: In evidence.

14 MR. PARRISH: Your Honor, I believe the school
15 records are in the jury binder, beginning at page 447.

16 THE COURT: The jury may turn to it.

17 Q Professor, let me show you what's marked as defendants'
18 exhibit -- let me wait for the jury to get the binders.

19 A They have two binders. You have to get the last one.

20 MR. PARRISH: Page 449, defendants' binder for
21 Professor Carstensen.

22 Q Professor, let me show you what has been marked as
23 Defendants' Joint Trial Exhibit number 12,000 and ask you if
24 you can tell us what that is?

25 A Well, I can -- it's in the jury binder as well and you

1 can show the jury, it's on 456 and it's, of course, Rose
2 DeFrancesco, her maiden name, and high school record from
3 Washington Irving High School and as you can see, she was in
4 high school from 1941 to early 1943, when she left school to
5 work.

6 The highlighted part simply -- and I think it's
7 marked in your binder, health, education. She took the
8 courses and I think did reasonably well in them over that
9 period of time.

10 Q Professor, Mr. Edell asked you some questions yesterday
11 about the percentage of advertising and different
12 publications.

13 Do you remember that?

14 A Yes.

15 Q I think he showed you a February 23, 1954 issue of the
16 New York Herald Tribune.

17 Do you remember that?

18 A Yeah.

19 Q Let me hand that to you.

20 Did you look through that yesterday after Mr. Edell
21 gave that to you?

22 A Yes.

23 Q Are there any cigarette advertisements in that issue?

24 A Yes.

25 Q How many?

1 A One.

2 Q Do you remember how many articles Mr. Edell told you
3 were in there?

4 A I think he said that they had done a count and figured
5 an average of 250.

6 Q What brands of cigarettes is advertised in there?

7 A Sano.

8 Q Do you recall Mr. Edell asking you some questions
9 yesterday about what page articles were on, whether they
10 were on the front page or other pages?

11 A Yes.

12 Q What significance, if any, was that to your opinions in
13 this case?

14 A Well, it could make a difference, depending on what
15 particular issue, but in this particular case we know from
16 Mr. Cipollone's deposition that he made a point of finding
17 these articles and showing them to Mrs. Cipollone.

18 Mrs. Cipollone herself said that she was constantly
19 being given these articles and that in addition, Mrs.
20 Cipollone characterized the articles that were in the
21 magazines as saying there were articles about smoking and
22 health in lots of magazines. That was her terminology.

23 So that presumably the location -- and she,
24 herself, read, she said, cover to cover. She was an
25 enthusiastic newspaper reader is the way I would put it.

1 Q Mr. Edell asked you some questions yesterday and I think
2 again today with regard to advertising in the print media.

3 Do you remember those questions?

4 A Yes.

5 Q And then I think he also asked you today about cigarette
6 advertising in TV and radio.

7 Do you remember those questions?

8 A Yes.

9 Q With regard to the school component of the information
10 environment on the chart here, was there cigarette
11 advertising in that part of the information environment?

12 A No. Occasionally there were efforts to incorporate
13 discussions about advertising into the health curriculum,
14 for instance.

15 Q What about in the Government component?

16 A I don't believe so. I mean, that was things like the
17 prohibitions on sales and the Surgeon General's report.

18 Q What about the literature component of the information
19 environment, was there cigarette advertising in that part?

20 A No, not at all.

21 Q What about the language?

22 A No, that was the slang terminology in particular.

23 Q What about family?

24 A Well, obviously in the way the print media came to be
25 incorporated, Mr. Edell reminded us properly they had

1 clipped the advertising among other sources from scrap books
2 when she was young, though I've -- the context of the family
3 is much broader and strikes me that the advertising was a
4 fairly small part of the family environment.

5 Q Thank you.

6 MR. PARRISH: Nothing further.

7 THE COURT: Anything?

8 MR. BLEAKLEY: No.

9 THE COURT: Mr. Edell, any recross?

10
11 RECROSS-EXAMINATION

12 BY MR. EDELL:

13
14 Q You reviewed Mr. Cipollone's deposition to suggest to
15 the jury that he cut out or showed to Rose Cipollone
16 articles on cigarette smoking and health beginning in the
17 1950s. Is that your testimony?

18 A That's what I recall and I think Mrs. Cipollone had
19 similarly talked about it in that way.

20 Q And if Mr. Cipollone testified that, in fact, it didn't
21 happen until the mid or late 1960s, would that change your
22 opinion in any way?

23 A Well, I didn't rely just on his opinion. Mrs. Cipollone
24 had also characterized the kinds of things that she did
25 read. She specifically remembered the Surgeon General's

1 report in terms of both the newspaper reports and presumably
2 the magazine as well, the television reports and she also
3 did characterize herself as a regular and thorough reader of
4 the newspaper, so that she, herself, indicated that she had
5 seen a significant number of these articles.

6 Q But Rose Cipollone, you remember, testified that she
7 didn't recall Tony giving her articles in the '50s or the
8 '40s. Isn't that correct?

9 A I'm not -- I don't recall. Specifically she mentioned
10 what the time frame was, she said that she remembered being
11 given them constantly and that she did, in fact, read them.
12 She made specific reference to the Surgeon General's report.

13 Q Which was ten years after this issue. Isn't that
14 correct?

15 A This particular issue, yes.

16 Q And if Rose Cipollone, according to your testimony, in
17 fact, read this newspaper article, she would have seen the
18 article on page 11, wouldn't she?

19 A Sure.

20 Q And can you tell the jury what that article is on page
21 11?

22 You saw it in your review, didn't you, professor?

23 A Sure, eh, yeah.

24 "Cigarette and lung cancer, Dr. Little says, 'Show
25 me.'"

Q And Dr. Little goes on to question the relationship between cigarette smoking and disease in that article, doesn't he?

A Yes.

Q Now, you're aware, sir, of practices by the tobacco companies in handing out cigarettes outside of school areas?

MR. PARRISH: Objection, your Honor.

THE COURT: Sustained.

MR. EDSELL: No further questions.

REDIRECT EXAMINATION

BY MR. PARRISH:

Q Mr. Edsell showed you the issue from the Herald Tribune just now and asked you to look at the article?

A Yes.

Q Does that change your opinion in any way?

A No.

Q Why is that?

A Well, I acknowledged all along that that kind of information not only from the tobacco industry but also from other sources, including the editorial writers of the Daily News, had questioned the relationship.

I based my opinion on the totality of the environment, not just the print media, but all of it. And.

1 in fact, it was critically important for me that you get
2 what I characterized as the kind of backgrounds and
3 literature where you got the slang terminology instead of --

4 MR. EDELL: Are we going to get a summation by the
5 witness?

6 THE COURT: Sustained.

7 MR. PARRISH: Thank you. Nothing else.

8 THE COURT: You may step down.

9 We'll take our midmorning recess and resume at five
10 of 12.

11 THE CLERK: All rise.

12 (Recess.)

13 THE CLERK: All rise.

14 (Jury present.)

15 THE COURT: May I see counsel at side bar?

16 (The following takes place at side bar.)

17 THE COURT: There was one remaining issue I want to
18 rule upon before the witness starts.

19 I am going to permit the defendants to ask the
20 question, and I want to limit it, Mr. Bleakley, I do not
21 think it is appropriate to ask the expert to characterize
22 the testimony of another expert. But I think it is
23 perfectly appropriate for you to ask a general question as
24 to whether or not, in his opinion, an expert in this field
25 can render an opinion about a particular consumer's behavior

1 or expected behavior without referring specifically to the
2 plaintiff's expert and to that extent, I will overrule the
3 objection.

4 MR. BLEARLEY: I am not sure I understand why.

5 It seems to me the appropriate way and a perfectly
6 proper way, as well as the most effective way, is to remind
7 the jury of the specific testimony that Dr. Cohen gave.

8 This is a rebuttal witness, and this witness is going to
9 comment on the opinions expressed by Dr. Cohen, not just in
10 the abstract, but specifically the opinions of Dr. Cohen.

11 The jury isn't going to understand if they have to
12 wait for me to make the connection in closing, the jury may
13 not understand.

14 THE COURT: You can lay a foundation by saying that
15 he rendered an opinion and then ask a general question as to
16 the propriety of such an opinion.

17 MR. COHN: Excuse me. Mr. Edell was allowed with
18 his experts to --

19 THE COURT: I want to say something right now. I
20 want to rule on specific objections -- and excuse me for
21 interrupting you -- that are presented, and I do not want a
22 recitation of what I did on another matter. I try to be
23 consistent, but I make my rulings on specific matters that
24 are presented to me, and we waste a lot of time on
25 historical --

1 MR. CONN: This is exactly the objection I made
2 when Mr. Edell confronted and asked his experts to
3 contradict directly the expert opinions of witnesses that
4 hadn't showed up at trial yet.

5 He was allowed to say, have you read the expert
6 opinion of Doctor So-and-So, and contradicted directly. I
7 think you are not being consistent. I do not like to go
8 into historical things only when I think you are not being
9 consistent and I objected to that. This is not like the
10 other time. I objected to it and you said it's perfectly
11 proper. We can do it with respect to a witness who is --

12 THE COURT: I think the general rule is and has
13 always been, a witness does not go around saying another
14 witness is wrong or the opinion is wrong. They give their
15 own independent expert opinion, and because of the problems
16 that have been raised here, because of the claim of lack of
17 notice, that limitation will apply in this particular
18 instance.

19 MR. EDELL: Your Honor, I assume that the Court is
20 going to -- by doing this you will let them, in effect, get
21 into the issue of Joel Cohen's ability to predict individual
22 behavior in terms of the palladium cigarette, which I was
23 never advised of.

24 Quite frankly, your Honor, it took them a day to
25 depose Dr. Cohen on that subject. Mr. Kearney took the

1 better part of the day on the subject of a palladium
2 cigarette.

3 THE COURT: I didn't think the proffer was anything
4 other than a single opinion by this witness that it was not
5 within an expert's ability or competence to render such an
6 opinion --

7 MR. BLEAKLEY: Correct.

8 THE COURT: -- without details.

9 MR. EDELL: So he will say, no, it's not.

10 THE COURT: Yes.

11 MR. EDELL: What is the basis of that opinion?

12 MR. BLEAKLEY: Then we are going to talk about what
13 people who are experts in marketing and consumer behavior do
14 and he will say, people do not render opinions on specific
15 named individuals.

16 THE COURT: So it is still in the general area as
17 to the area --

18 MR. EDELL: How do I prepare for his examination
19 when I just find out about it now?

20 It is one thing, and Mr. Bleakley said he could get
21 it done in an hour, when the witness said this is an
22 additional document I inadvertently didn't tell you about.
23 Maybe you can accomplish that within a certain period of
24 time as long as it is not a new subject matter. Here, I
25 have a brand new area of subject matter from this witness.

1 Quite frankly, if I received a report from him on
2 the subject, I would contact my expert witness and say
3 Professor Martin has now expressed an opinion to the
4 following effect that you cannot predict individual
5 behavior. What do you think about it?

6 My expert would say well, you should approach it
7 this, this, this, and this way in a discovery deposition and
8 let me get together some of the literature that might
9 support your position in trial so that you can cross-examine
10 the witness.

11 I am not going to be able to do it. Unless the
12 Court will take a hiatus, take the next three days off to
13 permit my expert to go get the material, to cross-examine
14 the witness, how am I going to be prepared to cross-examine
15 him in a competent fashion on the subject?

16 THE COURT: I will tell you what I will do for you.

17 If indeed after hearing the testimony you need that
18 opportunity, we will postpone his cross and they will bring
19 him back. That is all.

20 MR. BLEARLEY: Let me add two things in response to
21 what Mr. Edell says.

22 He knows, in fact, that one witness has already
23 expressed that view and he also knows that I asked Dr. Conen
24 on cross-examination and in his deposition to provide any
25 such literature and he was unable to.

1 But, in any event, I think your Honor's solution is
2 right.

3 THE COURT: All right. If you need assistance, I
4 will give you --

5 MR. EDELL: In addition, I object to the documents
6 in the jury binder that are nothing more than learned
7 treatises. The Court apparently has decided to permit the
8 witness to testify on the subject, but that doesn't mean
9 that the documents now come into evidence.

10 THE COURT: They won't be going into evidence.

11 MR. EDELL: They shouldn't be in the jury binder
12 then.

13 THE COURT: No. Just to assist the jury I have
14 always permitted the jury to follow, if the witness is
15 reading from something, to read along with him but I will
16 not permit it to be received.

17 MR. EDELL: I have attempted to put documents in
18 the binders to be learned treatises and there was a
19 strenuous objection by the Defendants and I was not
20 permitted to use it as means by which to discuss it.

21 I remember the Court, on occasion, has permitted a
22 blowup of a portion of a learned treatise but to have
23 portions of documents that are considered learned treatises
24 is some talk about risk. Risk is part of every day life
25 that has nothing to do with his opinions in this case.

1 There may be a narrow statement in the learned
2 treatise that supports his opinion and that is why there is
3 a rule that permits only that portion to be read to the jury
4 by the witness.

5 And the witness -- the remaining portions of the
6 document doesn't --

7 THE COURT: Have they been highlighted?

8 MR. EDSELL: Sure. Let me show you an example.

9 THE COURT: Do you have any objection to the jury
10 looking at the highlighted portions?

11 MR. EDSELL: Yes, I do. Can I show you a perfect
12 example?

13 THE COURT: All right.

14 MR. BLEAKLEY: Your Honor, the jurors are examining
15 the jury binder right now. I have no idea what jury binder
16 it is, but under all of the instructions they are not
17 supposed to be sitting here and choosing for themselves
18 during breaks, and the jury binders are filled with
19 documents that your Honor expressly excluded from the
20 examination of Dr. Carstensen and right now, jurors one,
21 two, four, five, six, at the very least, are examining and
22 discussing the jury binders.

23 MR. EDSELL: How do you know which one they are
24 discussing?

25 MR. BLEAKLEY: I don't and neither does Mr. Edsell.

1 MR. EDELL: That is perfectly the point. If you
2 have --

3 MR. BLEAKLEY: They might be reading the documents
4 you excluded yesterday but not yet removed.

5 MR. EDELL: Your Honor, they were not excluded.
6 The Court simply said I couldn't use them during
7 examination. Those are documents already in evidence.
8 Every document that I put into the jury binders yesterday
9 was in evidence except for the New York Times. Every copy
10 which was shown to the jury on --

11 THE COURT: Let us finish with this.

12 MR. BLEAKLEY: This is not jury deliberation and
13 they are not supposed to be reviewing.

14 MR. EDELL: Risk is a fact of life. Every person
15 balances risks against the attainment of goals and trades
16 off some kind of hazards.

17 What does that have to do with advertising?

18 THE COURT: That is to the admissibility.

19 MR. EDELL: But it is in the jury binder and it is
20 highlighted.

21 THE COURT: I will not let the jury look at it till
22 it's offered and I will deal with it then.

23 (End of side bar.)

24 THE COURT: Let me remind the jury again about
25 utilization of the binders. If in this recess you were

1 looking at something that is already in evidence, and we
2 referred to it, there is nothing improper with it. But I
3 want to remind you that sometimes in these binders there are
4 documents which have not been offered in evidence or which I
5 have excluded. So make certain if you, at any of these
6 times, are looking at the documents that you only look at
7 the things that have been previously permitted.

8 MR. BLEAKLEY: The defense calls its next witness,
9 Dr. Claud Martin.

10 THE CLERK: Place your left hand on the Bible.

11
12
13 DR. CLAUD MARTIN, JR. having been duly sworn,
14 testified as follows:

15 THE CLERK: Be seated.

16 State your name for the record and spell your last
17 name.

18 A Claud R. M-a-r-t-i-n, Junior.

19 MR. BLEAKLEY: Your Honor, we have a jury binder
20 for Dr. Martin. Perhaps now would be a good time to gather
21 up the jury binders for the preceding witness and replace
22 them.

23 THE COURT: What is the easiest? Would the jury
24 like these binders moved out of the way? If so, I will have
25 Mr. Underwood collect them from you.

1 MR. BLEAKLEY: Do you want me to help, Mr.
2 Underwood?

3 THE COURT: If you don't mind, Mr. Bleakley, yes.

4 THE COURT: We are building the wall of China here,
5 I think.

6 (Jury binders passed out.)

7 THE COURT: So, again, the same rule goes into
8 effect. These are new exhibits and you should not look at
9 anything until I give you permission to do so.

10 MR. BLEAKLEY: I have a copy of the binder for the
11 Court.

12 MR. BLEAKLEY: Everybody have one?
13

14 DIRECT EXAMINATION

15 BY MR. BLEAKLEY:

16 Q Where do you live?

17 A [DELETED]

18 Q What do you do for you a living?

19 A I am the Isadore and Leon Winkelman Professor, Graduate
20 School of Business Administration of University of Michigan
21 and also Chairman of Marketing Faculty of that institution.

22 Q How large is the marketing department of the University
23 of Michigan?

24 A The marketing department of the University of Michigan
25 currently has 14 full-time faculty, 2 visiting professors,

1 and we are adding three more full-time faculty. In fact,
2 have already retained them, plus we will have six visiting
3 professors next year, all of whom have been retained up to
4 this point.

5 Q You you are the chairman of marketing department?

6 A Yes.

7 Q How long have you been chairman?

8 A About two and a half years.

9 Q How many students take the courses that are taught in
10 the marketing department at Michigan?

11 A Well, every student in the Graduate School of Business
12 takes a course in marketing at least one, so every student
13 in the school -- and that numbers close to 200 students.

14 Q The marketing department is part of the business school,
15 is that correct?

16 A Correct.

17 Q What do you call it formally, the Business School?

18 A Well, it is called the School of Business
19 Administration. The word "graduate" has been used formally
20 for many years.

21 Recently the dean has begun to call it just the
22 School of Administration because we do maintain a very
23 active kind of a honors program at the undergraduate level
24 for juniors and seniors and didn't want to ignore the
25 undergraduate students.

1 Q Do you have both teaching and administrative
2 responsibility?

3 A Yes.

4 Q Describe for the Court and jury the courses that you
5 teach at the present time.

6 A Yes. At the present time I teach a course in
7 advertising management. I also teach a course in retail
8 marketing, and then I teach the basic course at the graduate
9 level in what is called marketing management.

10 Q Okay.

11 A I also am an instructor in our executive education which
12 is part of the teaching assignments that I fulfill for the
13 University.

14 Q What is the executive education program?

15 A The university business school has a division called
16 executive education, where we provide ongoing education for
17 people in business, beyond their terminal degree, and
18 we're -- my understanding, we are at least one of the
19 largest, if not the largest program, in the United States in
20 providing that form of education to people ongoing in their
21 managerial positions.

22 Q What kind of courses do you teach in the executive
23 education program?

24 A At the University I teach in the new product -- in the
25 new product development course. In fact, in that area my

1 area of responsibility is in idea generation and talking
2 about creativity and also talking about services.

3 Then I am the -- an academic director, if you want,
4 of the thing called marketing for non-marketing managers,
5 which is an attempt to present the marketing discipline to
6 those people whose concentration is not in marketing, and
7 then I am core faculty member of banking and financial
8 services executive program, Graduate School of Business
9 Administration, which is offered in May.

10 MR. BLEAKLEY: I note that he is referring to his
11 curriculum vitae.

12 Could the jury open to it, which is, I believe, the
13 first document after the photograph and follow along as he
14 describes his qualifications?

15 THE COURT: Fine.

16 Q Now, I believe you said that in the school to students,
17 you teach a number of courses, one of which was advertising
18 management.

19 Would you briefly explain what that is?

20 A The course involves really training people who are going
21 to go into the area of advertising and who will function
22 principally as an accounts executive or as a brand manager
23 for a company or be in the advertising department of the
24 company, and that course entails going through advertising
25 as a discipline educating them in that course.

1 Q And you said you taught a course called Retail
2 Marketing, is that the right title?

3 A Yes.

4 Q What is essentially the subject matter of that course?

5 A That course is interesting because it is the one course
6 that I in the past have taught undergraduates, but it is the
7 one course that I currently teach in the undergraduate
8 curriculum, and it is an attempt to have the students come
9 with an understanding of what is retail marketing.

10 Principally it is offered for those students who
11 have an interest in becoming employed in the retail
12 industry, principally department stores, food chain stores
13 and the course itself while it has a number of different
14 components parts, I think the three main parts are, first of
15 all, it concentrates on understanding of the basic material.

16 Second, it provides them experience in doing case
17 work where they actually analyze cases for various retail
18 companies.

19 And then third, which is the most exiting at least
20 for me, is my students are assigned to two person teams and
21 sent out to put together a total business plan for a new
22 retail store, or it can be a service, in the Ann Arbor area,
23 and they have to go out and find the real estate agents,
24 interact with the real estate agent, have to put together a
25 plan which includes the merchandizing plan, put together the

1 layout plan, put together the advertising plan. And then
2 they have to submit that and I grade it, and I am happy to
3 report this year it was an exciting year because one of
4 those was actually brought to fruition and opened up a month
5 ago.

6 Q Now, you said you taught a course that I believe was
7 called marketing management?

8 A Yes.

9 Q What is that?

10 A Marketing management is really the basic course that we
11 offer for the many BA students to have them understand the
12 discipline of marketing and how to manage from a marketing
13 perspective.

14 It involves really for them to literally look at
15 what are the resources and the objectives of the
16 organization, and if you want -- kind of marry them to the
17 needs and the wants and the attitudes of the customer out
18 there, and it involves all of the things that are involved,
19 from getting the product or service even in the sense of
20 developing the product or service, all the way to the
21 delivery of that service or product to the customer or
22 consumer and evaluating how successful they have been.

23 Q What are your administrative duties as chairman of the
24 marketing department?

25 A Now, the administrative duties involve, first of all, I

1 have to manage all of the funds within the department.

2 Now, I don't have responsibility for salaries. The
3 dean keeps that to himself, and the executive committee, but
4 I administer all of the funds within the department,
5 including one rather large scale research fund and
6 scholarship fund we maintain, so I have the administrative
7 responsibility of managing that.

8 Second, I assign -- well "assign" is maybe a poor
9 word because when you are dealing with academics, you kind
10 of cajole them at the time, but I have responsibility for
11 making sure that all of the courses are staffed and who
12 staffs them, and I have additional responsibility that I am
13 the -- official title is course coordinator.

14 I am responsible for frequently the curriculum and
15 coordinating the curriculum, the exams and the teaching
16 within both the basic course of the undergraduate level and
17 at the graduate level.

18 Among my other responsibilities are that I administer the
19 faculty and Ph.D. recruiting that we do in the school. We
20 have an active program of recruiting in faculty and so I
21 administer that, do all scheduling.

22 I do all the administration of our -- it's a fund
23 that's named after our former chairman, Eleanor Felts. And
24 that fund as a component part of it invites distinguished
25 scholars to come and interact with our faculty and doctoral

1 students and I'm in charge of administering, scheduling,
2 inviting those scholars to come to the campus.

3 This year I've taken on an additional
4 responsibility beyond those kind of basic things. And that
5 additional responsibility is that I'm involved in trying to
6 put together and coordinate a new program that we've engaged
7 in with the University of Trent, which is located in the
8 eastern Netherlands, to develop an executive education
9 program that addresses marketing in the field of
10 technology-based and high-technology products. It's
11 involved in trying to coordinate the faculty and the
12 curriculum for that offering, which will be mainly centered
13 toward firms that are marketing in technology-based
14 industries in Germany, the Netherlands, Belgium and
15 including American-based firms.

16 I think that gives you an impression of some of the
17 things that I do as administrator of the department, beside
18 answering the telephone all the time from students who
19 either are complaining or wanting things.

20 And I found out this morning I have a stack of
21 phone calls that high, as part of that activity.

22 Q How long have you been teaching at the University of
23 Michigan?

24 A Since 1965.

25 Q And how long have you been chairman of the marketing

1 department there?

2 A For about two an half years.

3 Q Would you describe for the Court and the jury your
4 educational background?

5 A Yes. I have a Bachelor of Science degree from the
6 University of Scranton, in Scranton, Pennsylvania, with a
7 major in business. In fact, a major in marketing. That was
8 in 1954 that I was granted that degree.

9 In 1963 I received a Master of Business
10 Administration from that same school, University of
11 Scranton.

12 Then in 1969 I received a Ph.D. in business
13 administration with a major in marketing from Columbia
14 University in New York City.

15 Q When you received your Ph.D. in business administration,
16 did you have to do a doctoral dissertation?

17 A Yes.

18 Q What was the subject of your doctoral dissertation?

19 A My doctoral dissertation was basically in the area of
20 consumer behavior and addressed two theories that had come
21 out of the field of sociology, had been developed by a
22 William McPhee and Jealt with the theories of double
23 jeopardy and natural monopoly and how they related to brand
24 loyalty.

25 Q When you said it dealt generally with the subject of

1 consumer behavior, what do you mean by that?

2 A This is the study -- if you remember a moment ago when
3 we talked about what is marketing, one of the aspects of
4 marketing is marrying the company or the organization to the
5 needs and wants and attitudes of the consumer and
6 understanding how that consumer behaves and that's really
7 what consumer behavior is all about.

8 Q Is the subject of consumer behavior involved in any way
9 in the courses that you teach and that you described a few
10 moments ago?

11 A Yes, in every one of the courses that I teach.

12 Q Who was the chairman of your doctoral committee when you
13 received your Ph.D.

14 A The chairman of my doctoral committee was Professor John
15 A. Howard.

16 Q Was Paul Lazarsfeld in the organization that reviewed
17 your work?

18 A Yes. In part of the doctoral committee when you have it
19 reviewed, is that you have people from within the business
20 school review, but there is also the need to have outside
21 members on the committee and I was privileged to have very
22 eminent sociologist Dr. Paul Lazarsfeld, a member of my
23 committee.

24 Q Who is Dr. Lazarsfeld?

25 A Dr. Lazarsfeld was a sociologist who also occasionally

1 did offer lecture material at the Columbia University, which
2 I took some of his courses.

3 Dr. Lazarsfeld was at one time the director of
4 applied social research at Columbia. I believe he is since
5 deceased.

6 Q Would you describe for the Court and the jury your work
7 experience up until you went to the University of Michigan
8 in 1965?

9 A Well, during the time I was in college, to support
10 myself, starting in 1952, I got into the radio and
11 television industry as a newsman and worked in northeastern
12 Pennsylvania as a newsman. That's through 1955.

13 Then in 1955, I got drafted into the United States
14 Navy and was sent to the Armed Forces Radio and Television
15 Service headquarters in Los Angeles, in Hollywood, was the
16 night operations supervisor there, principally involved in
17 managing the news function and producing news shows for
18 dissemination around the world. Voice of America
19 transmitters is what Armed Forces Radio used, so I was
20 producing and announcing and doing shows that directed
21 themselves toward our servicemen in Alaska, the Aleutians,
22 Japan, Korea, the Philippines, Marianas and the Caribbean.

23 In 1957, upon discharge from the Navy, I became the
24 news director at WHYP-TV in Scranton, Pennsylvania, and
25 served there until 1961, when I kind of temporarily left the

1 news and broadcasting business and for two years I was the
2 director of systems for Blue Cross, Blue Shield in
3 Pennsylvania.

4 In 1963 I became a -- I received my M.B.A. degree,
5 became a research assistant at Columbia University while I
6 was in the doctoral program. But also during that period of
7 time, I guess by now I'm safe enough to admit it, I
8 moonlighted on weekends doing radio news casts on both
9 Saturdays and Sundays for the two years until I left
10 Columbia.

11 In 1964, while I was still at Columbia, I took on a
12 full time teaching position at St. Francis College across
13 the river in Brooklyn, New York, and I lectured in marketing
14 there until I completed my course work at Columbia
15 University and joined the faculty of the University of
16 Michigan in the fall of 1965.

17 Q And what are each of the positions that you held at the
18 University of Michigan up until the time you became chairman
19 of the marketing department?

20 A Well, from 1965 to 1969, I was a lecturer in marketing
21 and then, as soon as I received my Ph.D. degree, I became an
22 assistant professor of marketing. That's the beginning of
23 the ten year tract level through academic life, you become
24 an assistant professor.

25 In 1973 I was promoted to associate professor with

1 tenure marketing at the university and then four years
2 later, 1978, I became a full professor of marketing at the
3 university and in 1980, I was named by the regents to the
4 Winkelman professorship of retail marketing in the business
5 school.

6 Q Have you authored any publications in the area of
7 advertising or marketing or consumer behavior?

8 A Yes, I have.

9 Q Have you written any books?

10 A Yes, sir.

11 Q How many books have you written and on what subjects?

12 A Well, I'm the author of five books in monographs and
13 they are listed on my curriculum vitae.

14 The books and monographs fall into kind of two
15 categories. First of all, I've done a number of books on
16 electronic funds transfer systems, which involve the
17 electronic transfer of monies in the banking and financial
18 services system.

19 Then I authored a study for the -- which was
20 published by the Federal Reserve Bank of Chicago, which was
21 under the auspices of the Board of Governors of the Federal
22 Reserves, into the research that I did into the marketing
23 acceptance of the Susan B. Anthony dollar.

24 I also did some work that was part of a national
25 science on telecommunication and electronic funds transfers

1 systems that was published by the university and then a
2 co-author of mine, James Lee, and myself did a work which is
3 a monograph on the conceptual development of the situation
4 and setting in marketing exchange toward a more perspective
5 of marketing. That was published by the J.A.I. press in
6 1985.

7 Now, in addition to those, I also list in my books
8 and monographs that I have been the co-editor of a
9 publication, this is an annual referee publication. Referee
10 meaning people review monographs that are going to be in
11 there, in the field of advertising. And we have published
12 that annually since 1978 through this year and currently
13 monographs and articles are in for publication of the 1988
14 edition.

15 Q Approximately how many books and articles have you
16 written or edited?

17 A Well, as I've laid out here, I have about 60 articles
18 that appeared in national, international journals and I've
19 given you a selection of those which are refereed and are
20 research based.

21 Then I am also authored the five books and
22 monographs and then the co-editor of the current issues in
23 research and advertising journal, which has appeared each
24 year since 1978.

25 Q And how many, if any, of these books and articles that

1 you have written or edited have dealt with the subjects of
2 marketing or consumer behavior?

3 A I believe all of them.

4 Q All of them have dealt with the subject consumer
5 behavior?

6 A Marketing, consumer behavior, advertising, yes.

7 Q Let's talk just about advertising for a moment, Dr.
8 Martin.

9 Have you studied in the field of advertising?

10 A Yes, sir.

11 Q In what way, would you describe that to the jury?

12 A Well, my undergraduate curriculum I took courses in the
13 field of advertising and also in my M.B.A. and Ph.D. I've
14 had an active program of research in the field of
15 advertising. I've, as I said, edited a journal in the field
16 of advertising that made judgments about manuscripts.

17 I have also served as an author and presenter of
18 pieces on advertising in consumer behavior but advertising
19 at the association for consumer research.

20 I'm a member of the Ad Craft Club of Detroit, which
21 is an association of advertising professionals and academics
22 in the Michigan area.

23 I presented papers in Europe dealing with
24 advertising in the European Academy of Marketing and then I
25 also have served, since 19 -- I believe it's 1980 or '81, as

1 a member of the research committee for the American Academy
2 of Advertising. And this year I'm serving as Chairman of
3 that research committee for the Academy.

4 Q Are you a member of any professional organizations?

5 A Well, in addition to the ones that I obviously have been
6 a member of because I presented papers, I'm a member of the
7 American Marketing Association. The American Collegiate
8 Retailing Association, the Academy of Marketing Science, the
9 Southwestern Marketing Association, Strategic Management
10 Society. And then the ones that I have mentioned earlier,
11 Association for Consumer Research, the A/Craft Club, the
12 European Academy of Marketing and the American Academy of
13 Advertising.

14 Q What is the Association for Consumer Research?

15 A The Association for Consumer Research began a number of
16 years ago when the field of consumer research began to
17 broaden out. We got a better understanding and there became
18 more interest in understanding consumer research. Marketing
19 began to -- if you want to leave its sole dependency on the
20 economics discipline and begin to embrace theories and
21 research and understanding from outside of just that narrow
22 perspective and look outside in the psychology, social
23 psychology, sociology disciplines and as that broadened,
24 there became an interest in having an association with
25 scholars in that field, would come together and share their

1 research and hopefully gain a better understanding of this
2 thing called consumer behavior.

3 Q Is there a difference between consumer research and
4 consumer behavior?

5 A Well, only in the sense that consumer research is the
6 attempt to find out information about consumers and learn
7 about them.

8 Among the things we want to learn about are their
9 attitudes and needs and behavior. It's really the same.

10 Q So the Association for Consumer Research deals with and
11 is concerned with human behavior. Is that correct?

12 A Oh, yes.

13 Q What about the American Marketing Association, what's
14 that?

15 A The American Marketing Association is kind of the
16 grandfather organization of our discipline. It's been
17 around a long time. It is all of the marketing peoples'
18 professional association and it consists of those people who
19 are professionals in the discipline that also consist of the
20 academics, so it's both people who are practicing
21 professionals in marketing and academics and it's a very
22 large organization.

23 Q Have you ever received any research grants in the area
24 of marketing or consumer behavior?

25 A Yes, sir.

1 Q And would you describe those for the jury, please?

2 A Well, among the research grants that I've received is,
3 as noted on my curriculum vitae, from 1968 to 1973 I was the
4 director of a research group and basically what this was was
5 a group of department stores that were throughout the
6 midwestern and southwestern United States. They didn't
7 compete with each other, but they got together monthly and
8 shared information and data and things of that sort. We
9 helped them manage that.

10 As a function of that, I was able to get research
11 grants from that group of stores to support some of my
12 research into consumer behavior and marketing.

13 Then in 1974 I received, along with William Hall, a
14 grant from the State of West Virginia. What the state was
15 interested in was, as part of their bicentennial activity
16 was to examine the potential for the development of
17 Blennerhassett Island, which is renowned in literature about
18 Aaron Burr, located in the Ohio river, right off
19 Parkersburg, West Virginia.

20 And we did what I thought was a pretty extensive
21 study examining the economic, cultural and educational
22 impact and this was a grant that my recollection was a grant
23 that came from the legislature of the State of West
24 Virginia. A part of this was to try and understand what was
25 the amount of consumer demand, how far would people come

1 from for the attraction on the island, which would include a
2 theatre and the historical rebuilding of Aaron Burr's
3 mansion.

4 Then in 1973 I have been an associate of the
5 Institute for Social Research at Michigan and they have a
6 Survey Research Center there. The Survey Research Center
7 was contracted by the United States Postal Service with the
8 idea of trying to understand what it is in the mail stream,
9 what kind of material is in the mail, both the household and
10 business mail stream.

11 So, they received a grant and I was part of the
12 research team and my specific responsibility in that area
13 was try to put together a part of a rather large scale
14 survey and write parts of the questionnaire and analyze the
15 results, try and understand what was going to happen to the
16 postal service if we all embraced the idea of electronic
17 phone transfer.

18 I've also received a number of grants in the period
19 from 1968 to 1979, that were underpinned the work that
20 graduate students did in examining marketing strategies for
21 a variety of firms that are listed on the curriculum vitae.

22 Then in 1978 I was contacted and asked if I
23 would -- and given a grant. This was a grant, not private
24 consulting, this was a grant to the University of Michigan
25 and I was the principal researcher in trying to understand

1 what might be the consumer demand and usage and what might
2 be the retailer reaction and what would happen in the system
3 with the introduction of a new coin that was going to come
4 out and that is the Susan B. Anthony dollar.

5 After that, and after having almost quickly -- I
6 want to say quickly having predicted the failure of that
7 coin, I was involved in the grant from the American Express
8 Company through the Survey Research Center to examine the
9 area of services. And that has been the beginning of a
10 series of different research projects and grants in the area
11 of services marketing.

12 In 1980 -- well, there are two events that happened
13 in here. Basically in 1980 I was contacted by a very small
14 task force out of the United States Government. That task
15 force consisted of the head of the counterfeiting division
16 of the United States Secret Service, the director of the
17 Bureau of Engraving and Printing and a special assistant to
18 Chairman Paul Volcker of the Federal Reserve System to
19 undertake a study, and it was classified as secret for about
20 four years, later made public, to examine --

21 Q I take it this is no longer secret?

22 A No, it is not. I can talk about it. It's been in the
23 press.

24 To examine what would be the public's reaction
25 basically to a change in the United States currency, talking

1 about a physical change in the currency, to test out the
2 various possibilities that were being generated and to look
3 at the potential for people in the general public to engage
4 in counterfeiting by use of copy machine technology.

5 In 1983 while I was going on, and because I was now
6 working in the field of coin and currency or at least I was
7 noticed in Washington, I was contacted by the treasurer of
8 the United States, Kate Ortega and they established a grant
9 through the school to examine kind of what they could do
10 with the Olympic coin. The Olympic coin was being issued in
11 conjunction with the Summer Olympics in Los Angeles and
12 always these mint and proof coins were positioned for the
13 serious coin collector and there was a desire on the part of
14 the treasurer to broaden this to the general public and to
15 understand what the public would want for this coin.

16 So we undertook a study to provide information that
17 would help understand the marketing and the advertising of
18 this coin consistent with the needs and wants of the public,
19 the consumer out there.

20 In -- I'm -- I have been on an ongoing project that
21 was begun actually in 1972, with a grant from the National
22 Science Foundation to a research task force within our --
23 within the university that cut across many of the different
24 disciplines.

25 Then recently I have had grants, both from the

1 university and currently I have an application in for
2 another grant to examine the viability of mail intercepts,
3 that is intercepting the public consumers in the shopping
4 mall and trying to test new product concepts, service
5 concepts and the viability of using that for advertising
6 copy testing.

7 And I am under a grant currently from the Executive
8 Education Division of our school, awarded \$35,000 grant just
9 recently to examine in the second phase, the new service
10 offerings, development of new services by a multi-national
11 firm.

12 Now, there is also a part of that that the
13 marketing sciences duties indicated they will cooperate and
14 sponsorship of that. I've also gotten sponsorship from IAE,
15 Aix-en-provence in France, to follow-up on our research,
16 both in the United States and Europe, with a development of
17 new services and also just recently been informed that we
18 will be able to administer the questionnaire that I've laid
19 on my desk at home and desperately needs to be finished off.

20 We will be able to administer that to several
21 thousand corporations or executives in Brazil. So, I think
22 that covers a lot of the different grants I got.

23 Q A part from the grants and other jobs that you've just
24 described, have you ever consulted for any American
25 businesses in other ways?

1 A Yes, sir.

2 Q Would you just list very briefly the companies, the kind
3 that the jury is likely to have heard of that you consulted
4 with?

5 A Yes. I hope you all heard of some of these.

6 I'll try and identify them as familiar, consistent
7 with your question. Time Incorporated, including both the
8 corporation and Fortune Magazine, Beecham Laboratories which
9 you probably don't recognize from its formal name, but
10 manufactures a whole host of headache remedies and kind of
11 over-the-counter pharmaceutical products and foods.

12 The Hershey Foods Corporation, which is involved,
13 as most of you know, is the candy business, but are also a
14 what we call package goods firm.

15 For Burroughs Corporations, now known as UNISYS,
16 the computer firm, Red Lobster Inns of America, which are
17 part of General Mills, STP Corporation, those are the people
18 with Andy Granitelli and you put the oil in your car. The
19 south -- the Southern New England Telephone Company, which
20 some of the jury may know and other people in the court,
21 which is the telephone company up in New Haven.

22 Bethlehem Steel Corporation, MAACO, the people who paint
23 your car and a chain across the United States.

24 Bell Communications Research, you may not
25 recognize, but they are an organization founded after the

1 AT&T Breakup and basically owned by the seven baby Bells or
2 former Bell operating companies.

3 The Automotive Warehouse Distributors Association,
4 which is an association of all of the -- kind of non-big
5 chain automotive supply firms across the country and the
6 Allen-Bradley Company which is in computing and software
7 equipment, and there are a lot of others but that is an
8 illustration of some I have served.

9 Q Any of the consulting work you have done for these
10 companies involved the subjective consumer behavior of
11 consumer research?

12 A Yes.

13 Q Have you received any honors or awards or recognitions
14 in the course of your professional career?

15 A Yes, sir.

16 Q Would you describe a few of them, please?

17 A As a result of my training in the MBA program at the
18 University of Scranton, I was elected to an international
19 honors fraternity, Alpha Sigma Iu, and then listed in a
20 number of different national biographic listings. Who's Who
21 in the World. Who's Who in America, so forth, Men of
22 Achievement, the Dictionary of International Biography. I
23 would think those are the principal ones.

24 Q Apart from the grants or projects that you have worked
25 on for the United States Government, have you ever done any

1 consulting for nonprofit organizations?

2 A Oh, yes.

3 Q Would you give an example or two?

4 A Certainly.

5 Well, first of all, I have been a consultant to the
6 University of Michigan itself and not in my school was a
7 consultant to the office of continuing medical education.

8 I think perhaps one of the more significant kinds
9 of consulting sciences -- where I actually was not paid but
10 served a nonprofit organization -- was to look at smoking
11 behavior among teenagers for the American Cancer Society.

12 Q How did you become involved with the American Cancer
13 Society on this program?

14 A Well, in 19 -- hard with the dates -- but approximately
15 1968 or '69, the American Cancer Society came to the
16 University of Michigan, and said, we have a study that we
17 have undertaken for us by a professional research firm
18 examining teenage smoking behavior in the United States.

19 What we would like you to do, we would like you and
20 your graduate students to examine that study and to devise a
21 marketing strategy for us addressing the question of teenage
22 smoking, with the goal of the American Cancer Society to
23 either have people not start smoking or to stop smoking if
24 they were already engaged in that activity.

25 We put together a strategic marketing plan for them

1 During that period of time, among the students in my MBA
2 students in course work and presented it to the American
3 Cancer Society.

4 The following semester many of my students and
5 including myself, as a liaison, worked with the team who was
6 called the advertising workshop that consisted of students
7 from a broad spectrum of disciplines and who tried to now
8 take that strategy and put it into a series of different
9 types of executions, principally advertising executions but
10 other forms of communication to address themselves to the
11 teenage market.

12 After that occurred, I was approached by the
13 American Cancer Society unit for the State of Michigan and
14 asked if I could help them out, and what they would like me
15 to do is to agree to be a volunteer, if you want, and be the
16 public relations chairman for the State of Michigan, and to
17 serve on the board of directors of the American Cancer
18 Society in the State of Michigan and I did serve on that
19 during the period from 1970 through 1971.

20 Q You mentioned refereeing a few minutes ago. Have you
21 been involved in refereeing or peer review in the marketing
22 and consumer behavior?

23 A Yes.

24 Q Describe it briefly.

25 A Very briefly. First of all, I do get involved in the

1 review process for our own journals, so many of our articles
2 are addressing themselves not only to the field of
3 advertising, but only consumer behavior.

4 I am on ad hoc reviewing, which means they call you
5 whenever they feel they can get your service for the journal
6 of marketing research.

7 I also have been a reviewer for the consumer
8 research in reviewing articles submit to that association
9 for annual meetings.

10 Been a reviewer for the American Marketing
11 Association for their annual meetings and as the member and
12 now chairman of the research committee for the American
13 Academy of Advertising, I have had to review research
14 proposals and later to evaluate articles that related from
15 them, because we administer out of that academy, research
16 grant to academics around the United States.

17 I have also evaluated all of the course in my time
18 in academic life, books and other articles for other
19 organizations.

20 Q Are you familiar with the term "content analysis"?

21 A Yes.

22 Q Do you know what content analysis is, would you tell the
23 jury what content analysis is?

24 A Content analysis is a -- it's kind of a funny animal in
25 the way because you hear it defined in a lot of different

1 ways.

2 One way of defining content analysis is you take an
3 advertisement or article or book. In any discipline it would
4 be looking at something like advertising and assessing it,
5 making an evaluation of it, making a judgment of it, and it
6 could be something as simplistic as a person making a
7 judgment of it.

8 Another way of doing it and I have done it --
9 another way of doing content analysis that is written up in
10 the literature is to take a series of advertisements and
11 have a group of people look at them and see whether or not
12 they come to some form of agreement on what is in that
13 advertising, what is its content.

14 Q Have you ever done a content analysis of that kind?

15 A I have never done a content analysis where we have had a
16 group of people, so-called judges involved, but I have done
17 content analysis.

18 Q Could you give us an example of content analysis you
19 have been involved in?

20 A Besides the usual looking at advertisements and making
21 judgments of them for organizations that you would be
22 serving for, yes, I got involved in the kinds of a more
23 formal type of content analysis and that is when the PepsiCo
24 organization wanted to acquire the 7-Up organization.

25 Just about a year or so ago, one of the problems

1 that they had with the Federal Trade Commission was that the
2 size of marketing share that would be transferred by the
3 combinations of PepsiCo and 7-Up and the combination at the
4 same time Coke Cola said they wanted to acquire Dr. Pepper.
5 The combination of putting four into two was going to be
6 what the Federal Trade Commission thought was much too large
7 of a market share.

8 PepsiCo -- and I might say I thought rightly, but
9 PepsiCo came to me and said, we think that the relative
10 market should be more than just carbonated soft drinks, that
11 we really ought to have an explanation of the definition of
12 what we are talking about here and that the market share,
13 how much sales you have, should really be of the total
14 beverage market or at least a larger definition.

15 My assignment in that case was to go out -- first
16 of all, was to go out and looking at advertising age to find
17 the relative material.

18 But as a compound of that to take the advertising
19 that had been done by all of the different beverage
20 companies and see whether or not there wasn't a similarity
21 between the advertising for say Kool Aid and for Coke Cola
22 or for coffee and for Pepsi or for Wine Coolers or for
23 Perrier and try to present it in the Federal Trade
24 Commission in the sense of here are some basic copy
25 executions that seem to make sense. Here are contents that

1 are so alike, we might be able to say this is a similar
2 market and I undertook it.

3 Q How did you become involved in this case?

4 A Well, the first -- I got involved in this case, I guess
5 initially, to be fair, in December of 1986. I was
6 approached by some lawyers, who said, we would like you to
7 consult with us on the issues of advertising and consumer
8 behavior, and marketing in the field of cigarettes.

9 Q Who did those lawyers represent?

10 A Let's see. The lawyers represented Arnold & Porter and
11 the other firm that was directly involved was Jones Day.
12 You have to give me a hand because I can't remember the
13 name.

14 Q The fellow from Arnold & Porter is me?

15 A Yes, and Jones Day out of Cleveland.

16 Q Who do we represent?

17 A Best recollection is that they said R.N. Reynolds.

18 Q Who did my firm say?

19 A Philip Morris. Sorry.

20 Q You were retained through a person in my firm on behalf
21 of the cigarette companies?

22 A Yes.

23 Q To consult?

24 A Yes.

25 Q Did there come a time when we asked you to consult with

1 us on this specific lawsuit?

2 A Yes.

3 Q And when was that?

4 A That was August of 1987.

5 Q And what did we ask you to do in August of 1987?

6 A In August of 1987 you asked me to undertake a study of
7 advertising in general, to also undertake a study of some
8 theories in the field of consumer behavior. To take a look
9 into the available literature on a thing called content
10 analysis, to -- you asked me to review a number of different
11 depositions that had been or were scheduled within the case.

12 You asked me to look at a lot of advertising both
13 within the cigarette industry and for other companies.

14 You asked me to examine various pieces of data and
15 I did.

16 Q And did we eventually ask you to come and testify here
17 in this case as an expert at this trial?

18 A Yes.

19 Q And have you come here today prepared to render your
20 expert opinion on the various subjects relating to
21 advertising and marketing and consumer behavior?

22 A Yes, sir.

23 Q Now, would you describe very briefly for the Court and
24 the jury, what work you undertook, that is, what research
25 you undertook to put yourself in the position of being able

1 to come here today and express your expert opinions?

2 A First, I undertook a literary search in the field,
3 generally in the field of advertising.

4 Then I undertook a research, review of all of the
5 literature, at least I hope, a substantial part of the
6 literature that dealt with the initiation of smoking
7 behavior and any literature that had been written on
8 causation with an emphasis on looking for empirical
9 research.

10 I undertook a search of the literature in a number
11 of the theories that seemed to have been advanced relative
12 to consumer behavior in this case, did a literature search
13 concerning the topic of a content analysis.

14 Then turned my attention to some of the econometric
15 studies that had been available.

16 I undertook to review the materials and the notes
17 that had been submitted by Drs. Cohen and Pollay prior to
18 the trial and undertook to review the various depositions in
19 the case.

20 Q Just run through those. Did you read the deposition of
21 Dr. Joel Cohen?

22 A Yes, sir.

23 Q And the documents that were referred to by Dr. Cohen in
24 that deposition?

25 A Yes, sir.

1 Q And did you read the deposition testimony of Richard
2 Pollay?

3 A Yes, sir.

4 Q And have you read the trial testimony of Dr. Cohen and
5 Pollay?

6 A Yes.

7 Q And referred to the documents that were relied on by Dr.
8 Cohen in his trial testimony?

9 A Yes, sir.

10 Q And the content analysis that was performed by Richard
11 Pollay?

12 A Yes.

13 Q Did you also read the deposition testimony of Rose
14 Cipollione?

15 A Yes. I actually read two deposition transcripts of Rose
16 Cipollione.

17 Q Did you --

18 MR. EDELL: Are we still on qualifications of the
19 witness?

20 MR. BLEAKLEY: Yes.

21 MR. EDELL: I don't know how this goes to his
22 qualifications, review of Rose Cipollione's deposition.

23 THE COURT: Mr. Bleakley?

24 MR. BLEAKLEY: I think it relates and I have no
25 doubt that Mr. Edell will question Dr. Martin at length, and

1 I think it is appropriate for the jury to understand what
2 work he undertook in connection with this case.

3 THE COURT: I will permit it. Overruled.

4 Q Did you read the testimony of Mrs. Cipollone as it was
5 read in the trial?

6 A Yes, sir.

7 Q And did you also read the deposition testimony of Dr.
8 Harold Carstensen? (sic)

9 A Yes, sir.

10 Q And did you read the trial testimony of Thomas
11 Defrancesco?

12 A Didn't read the trial testimony of Mr. Defrancesco. I
13 think I sat here and listened to it.

14 Q You heard it?

15 A Yes.

16 Q Have you reviewed in the course of your work in this
17 case any what have come to be referred to as internal
18 cigarette company documents?

19 A I have seen them, yes.

20 Q Which ones have you seen?

21 A The ones that were presented -- I concentrated my
22 attention on the ones that were discussed by Dr. Cohen.

23 Q Have you been paid for your work in this case?

24 A Yes.

25 Q And at what rates have you been paid?

1 A Well, my usual charge is \$1300 a day for an eight-hour
2 day.

3 Q And you expect to charge for your actual preparation for
4 your testimony here and your testimony here at the trial as
5 well?

6 A Yes, sir.

7 Q At the same rate?

8 A Well, for the time in preparation it is the \$1300 a day.
9 For the day of trial, it's \$2700.

10 Q And have you ever worked in any way as a consultant,
11 employee, expert witness, or in any fashion before with a
12 cigarette company or tobacco company?

13 A No, sir.

14 Q Have you ever worked with or been retained by or been
15 associated with an organization that helps to obtain expert
16 witnesses for trials?

17 A Yes, sir.

18 Q And what is that organization?

19 A Well, the organization is called TASA, Technical
20 Advisory Service -- can't remember what the last "A,"
21 Technical Advisory Service. Best of my understanding it's
22 located somewhere out of Philadelphia, Pennsylvania.

23 Q What is exactly the nature of your relationship with
24 TASA?

25 A Well, in 1978 TASA contacted me and said we are an

1 organization that gets contacted by attorneys who are
2 looking for expert witnesses and we kind of maintain a cross
3 file have people relative to their various expertise. Could
4 we call upon you or would you send us your curriculum vitae
5 which I did and over the period of time my principal contact
6 has been to supply with updates of curriculum vitae, perhaps
7 some letters.

8 I was contacted by them shortly after in 1978 or
9 '79 at best as I can learn from them in a case and paid
10 about \$290, and then I received a -- over the years they
11 have called me and said there is a case pending on such and
12 such a matter, would you even be interested.

13 And in many cases my response has been, no or
14 doesn't fit with my expertise, not really something I want
15 to be involved with.

16 A couple were sent to me and said the attorney will
17 contact you. In many cases the attorney just never
18 contacted me so the paper was filed away.

19 And recently I did get contacted by them, and they
20 asked me if I would like to work on a case that involved a
21 dealer who had been terminated by Cessna Aviation Company.

22 Since I ride on airplanes all the time, I kind of
23 got interested and thought this would be a wonderful way to
24 find out about the airplane building. Not necessarily
25 airliners, but I thought it would be kind of a fascinating

1 area and, surprisingly, what I found was that the law firm
2 involved was one that I had worked for previously at one --
3 a long time ago.

4 Q Have you actually testified in that case?

5 A No. Given a Deposition in the case.

6 Q You did give a deposition?

7 A Yes.

8 Q Apart from that Deposition have you ever testified as an
9 expert witness as a result of your association with TASA?

10 A No. Never have testified as a result of TASA.

11 Q Have you ever testified as an expert witness in a trial
12 before?

13 A Yes.

14 Q How many times?

15 A Well, I have to count them up Mr. Bleakley.

16 Q Approximately.

17 A I would say five times, maybe.

18 Q And have you ever testified as an expert witness in a
19 deposition as opposed to the trial of a case?

20 A Yes.

21 Q How much times?

22 A In that case I would say that it is probably like ten or
23 eleven. When you say "trial," I don't want to mislead the
24 record, I am not including in that administrative law
25 proceedings.

1 Q Some of them have involved administrative law
2 proceedings.

3 A Well, administrative law proceedings I testified back in
4 the late 60's, early 70's in dealing with financial
5 institutions of approximately 35 administrative law
6 proceedings.

7 Q Cases involving banks?

8 A Yes, cases involving banks, branches and new banks.

9 MR. BLEAKLEY: Your Honor, at this time I tender Dr.
10 Martin as an expert in the field of advertising, marketing
11 and consumer behavior.

12 THE COURT: Mr. Edell, any objections or voir dire?

13 MR. EDELL: Yes.

14 THE COURT: We will do that after lunch.

15 We will adjourn now and resume at 2:15.

16 All rise for the jury, please.

17 (Luncheon recess.)
18
19
20
21
22
23
24
25